Meeting – Determined not to be a meeting – E-mail canvass

Meeting – Determined not to be a meeting – Separate telephone calls to each member

Public Body – Determined not to be a public body – Subcommittee not created by legal instrument

Public Body – Determined to be a public body – Subcommittee created by legal instrument

May 23, 2011

Complainant:
Mr. Craig O'Donnell
Kent County News

Respondent:
Maryland Transportation Authority
Capital and Finance Committees

We have considered the complaint we received from Mr. Craig O'Donnell ("Complainant") on January 7, 2011. Complainant titled his complaint "Maryland Transportation Authority: Capital and Finance Committees: multiple violations alleged." He indeed asserted numerous violations regarding those Committees. Embedded among those many allegations, however, appear allegations regarding the Authority itself and an additional committee, a Human Resources committee. The Authority responded to the complaint by stating that the Capital and Finance Committees ("Committees") were not "public bodies" subject to the Act until November 24, 2010, when the Authority adopted a resolution "formally creat[ing] [them] for the purpose of making them subject to the Act."

We shall sort out and address the allegations by category. Because the Authority has now decided that the Capital and Finance Committees should operate in the open and has adopted a resolution that clearly makes them public bodies, we shall begin with the allegations of ongoing practices by the Authority itself.

We shall include the facts and the parties' contentions in the discussion.

I

Discussion

A. Allegations that the attendance at the Committees' closed meetings by other Authority members created a likely quorum of the Authority itself and thus required the Authority to follow the procedures of the Act at those meetings

Complainant alleges that the attendance of four Authority members at a September 2009 Finance Committee meeting constituted a quorum of the Authority itself and that the Authority did not give public notice of the meeting, did not hold it publicly, did not close it properly, and improperly denied access to the minutes by redacting various sections. He attaches a document on Authority letterhead entitled "Finance Committee Meeting – Notes of September 10, 2009." Those "Notes," approved by the Committee on October 8, 2009 "as written," reflect the attendance of the Chair and three Authority members, one by telephone, at the meeting. The Notes record the attendance of others; that list does not include other Authority members. The "Notes" of the October 8, 2009 meeting and the August 6, 2009 Capital Committee meeting yield the same numbers. The Authority's Fiscal Year 2010 annual report shows that its Board was comprised of the statutory eight members and Chair, the Secretary of Transportation, during that fiscal year. Under the Authority's Operating Policy, a quorum consists of a simple majority, excluding the Chair. Not counting the Chair, then, a quorum of a fully-appointed Authority Board is five members.

The Act applies only to meetings attended by a quorum of the particular public body. § 10-502(g) of the State Government Article; *see also* 5 *OMCB Opinions* 93, 94 (2007). Here, assuming that there were no vacancies on the Board on the dates in question, a quorum of Authority members did not attend these committee meetings. The Act thus did not apply to the Authority itself with respect to these Committee meetings.

B. Allegations that the Authority and Committees violate the Act by conducting business by telephone polls concerning documents exchanged privately

The Complaint alleges that the Authority's March 14, 2007 minutes refer to voting by e-mail or telephone polls and that those practices violate the Act. The Authority's Operating Policy contains the following provision regarding a meeting attended by fewer than a quorum:

> Alternatively, those members present, though less than a quorum, may conduct the meeting to transact essential business, or exercise any necessary power of the Authority; provided, however, that before such transaction or exercise becomes effective, the concurrence by telephone poll of such additional members as shall constitute both a quorum and a majority of such quorum shall be obtained. Any action taken pursuant to such telephone poll shall be placed on the agenda of the next meeting and formally ratified or acted upon at that meeting.

Under this Policy, "less than a quorum" may vote on an action in a public meeting; absent members may vote separately; the action may be taken; and that action may then be ratified at the next meeting in a public vote. We do not comment on whether this practice is conducive to a belief on the part of the public that the Authority operates transparently, because the fact of "less than a quorum" establishes that we have no jurisdiction over the matter. *See* 2 *OMCB Opinions* 49, 50 (1999) (finding that Act did not apply to voting by separate telephone calls; recognizing "that this way of proceeding deprives the public of an opportunity to observe the real decision-making process"); *see also* 2 *OMCB Opinions* 78 (1999) (finding that the Act did not apply to e-mail canvassing). Although other statutes or a public body's own procedures might require voting to take place in the presence of a quorum, the Act does not. The Act "simply sets rules that must be followed when a meeting subject to the Act occurs." 6 *OMCB Opinions* 57, 61 (2008). Accordingly, assuming that a quorum of Authority members are not participating in the same telephone call, the Authority's use of telephone polls does not fall within our jurisdiction. If, on the other hand, the Authority conducts meetings by conference call among a quorum of its members, and does so without giving public notice, the Authority is violating the Act.

Our jurisdiction is similarly limited with respect to the alleged practice of circulating documents among members outside of public meetings; the contents of mailings are not within our purview.

C. The allegations regarding the Finance Committee.

The threshold question here is whether the Finance Committee itself was a public body as defined by the Act, and hence subject to the Act, prior to its re-creation by resolution in November 2010. The question matters, the Complainant states, because the Authority redacted portions of minutes of meetings, notably those occurring in September and October 2009, and the Act does not permit the redaction of minutes of open meetings. *See* 7 *OMCB Opinions* 64, 66 (2010) (stating that minutes of open meetings may not be

redacted under a later-asserted claim of privilege). The copies that Complainant provided to us reflect substantial redactions. The Authority argues that no legal instrument created this Committee, the members of which were appointed by the Authority.

The relevant facts are as follows. The Authority is an independent agency, authorized under Title 4 of the Transportation Article to adopt its own rules and regulations. Its Chair is the Secretary of Transportation; it is otherwise composed of eight members, appointed by the Governor, who may not be Executive-branch employees. § 4-202 of the Transportation Article. The Authority provided us with an "Operating Policy" adopted in 1985; that Policy provides that it may only be amended by "resolution." The Operating Policy permits the members of the Authority to "provide for and appoint any committee or committees, to have such powers and perform such duties as may be assigned to it by the members of the Authority."

The Authority adopted various amendments to the Policy over the years, though not always by resolution. Specifically, the Policy was amended on or after March 14, 2007 to refer to an exhibit adopted on that date. As amended, the Policy provided:

> Each committee shall fix its rules of procedure, and shall meet as provided by those rules, or at the call of the chair or any two members of the committee. See Exhibit 1.

Exhibit 1, entitled "Capital Committee," sets forth procedures for that Committee's membership, meetings and minutes. Exhibit 1 does not mention the Finance Committee. It appears, however, that the Authority delegated substantial powers and duties to the Finance Committee. According to the Finance Committee's September 10, 2009 minutes, the Finance Committee "suspended the investment of commercial paper in January 2008" and also advised the Board on various matters. The minutes of the Authority's May 30, 2007 meeting, Complainant alleges, refer to the approval of a resolution "authorizing members of the Capital Committee ....[to] report actions taken or recommended at their meeting," so that a "streamlined agenda would basically be voted on as a consent calendar...." Those minutes, according to Complainant, also refer to the Finance Committee "working to draft a similar resolution related to delegation...." The Authority denies that any such resolution was validly adopted by the Board.

A literal application of the Act's definition of "public body" to the facts before us would suggest that the Finance Committee was not a public body until the Authority adopted the November 2010 resolution. We stated the three tests for a "public body" in 6 *OMCB Opinions* 21, 24-25(2010) and need not

repeat them here. The Finance Committee apparently does not meet the first test, the "legal instrument test," because it was not created by a legal instrument such as a rule, resolution, or bylaw. It would not meet the second test, *see* SG § 10-502(h)(2)(i), which includes bodies appointed by the Governor, because, under SG § 10-502 (h)(3)(ix), the term "public body" does not include a "subcommittee" unless that subcommittee was also created by a legal instrument. And it does not meet the third test because it did not include two or more individuals who were not members of its appointing entity, here, the Authority. *See* § 10-502(h)(2)(ii).

We hesitate to simply decline jurisdiction over this particular entity. Both Maryland appellate courts have to some extent promoted function over form in determining whether an entity is a "public body" under the Act. In *City of Baltimore Development Corporation v. Carmel Realty,* 395 Md. 299 (2006), the Court of Appeals looked to the "traits" of a private development corporation and applied the Act in accordance with its purposes:

> [T]he legislature, as a matter of public policy, has determined that it is essential to the maintenance of a democratic society that, subject to certain well defined exceptions, the deliberations of a public body be open to the public which it serves. An entity that possesses as many public traits as does the [Development Corporation] is a public body for purposes of the Open Meetings Act.

Id. at 329. The Court repeated its statement in *New Carrollton v. Rogers*, 287 Md. 56, 72-73 (1980) that the Act affords the public the right to observe the entire deliberative process:

> "It is, therefore, *the deliberative and decision-making process in its entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business*. In this regard the Supreme Court of Florida, in *Town of Palm Beach v. Gradison*, ..., construing that state's open meeting law, observed:
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> 'One purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. *That*

> *statute should be construed so as to frustrate all evasive devices*. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a governmental agency, and relates *to any matter on which foreseeable action will be taken*.' 296 So.2d at 477." (Emphasis added.)

395 Md. at 321.

The Court of Special Appeals took a similar approach in *Andy's Ice Cream v. City of Salisbury*, 125 Md. App. 125, 154, 143, 724 A.2d 717 (1999). There, holding that the Salisbury Zoo functioned as a public body subject to the Act, that court stated, "A private corporate form alone does not [e]nsure that the entity functions as a private corporation."

Here, the few facts we have could lead to an inference that this committee functioned as the Authority in some matters and also conducted business "to a point just short of ceremonial acceptance."

Our hesitation, however, only goes so far. Importantly, neither appellate court needed to apply § 10-502(h)(3)(ix), the "subcommittee" exception to § 10-502(h)(2)(i). The Maryland courts have never construed that exception, and we have rarely applied it. We are not free to disregard it, and we shall apply it here. Nonetheless, as a general matter, we do not believe that the General Assembly intended that public bodies could operate out of the sunshine by apportioning their statutory powers among committees composed of fewer than a quorum of their members.

We commend the Authority's decision that this committee should indeed operate as a public body. If the November 2010 resolution effecting that policy merely formalized a procedure by which the Finance Committee functioned as an arm of the Authority, we encourage the Authority not to stand on that formality with respect to content in the Committee's minutes that would not have been the subject of a properly-closed meeting.

D. The allegations regarding the Capital Committee.

The Complainant alleges that the Capital Committee was a public body even before the Authority adopted the November, 2010 resolution. The Authority disagrees. The Authority asserts that Exhibit 1, which was adopted on March 14, 2007 and sets forth the membership and procedures for a "Capital Committee," is not a valid "legal instrument" under SG § 10-

502(h)(2)(i) because it was not adopted as a "resolution," as required by the Operating Policy. The Authority states that in 2008 it cured the defect as to other amendments that had not been adopted by resolution, but that it "expressly declined" to ratify Exhibit 1. Further, the Authority asserts, "the original Operating Policy and virtually all of its amendments ... do not even mention or address the subject of committees." The Authority thus concludes that the Capital Committee was not a "public body" until the Authority adopted the November 2010 resolution. The Complainant replies by providing us with a June 28, 2007 resolution ("Resolution 07-06") which spells out the Committee's powers. In rejoinder, the Authority argues that Resolution 07-06 did not "create" the Committee for purposes of SG § 10-502(h)(2)(i).

We again look to the documents to assess the facts. The Operating Policy refers to the Capital Committee and attaches Exhibit 1. Exhibit 1 is labeled "Maryland Transportation Authority Capital Committee" and states "ADOPTED March 14, 2007." It provides: "The Capital Committee shall consist of a minimum of three (3) Authority members, appointed by the full Authority." Exhibit 1 further sets forth the function of the Capital Committee:

> The full Authority shall by resolution delegate approval authority of specific action items to the Capital Committee on behalf of the full Authority which are over and above the levels delegated to the Executive Secretary for planning, engineering, right-of-way and construction in the Authority's approved Capital Program, including, but not limited to, the following Action Items....

Exhibit 1 then lists eleven functions, including "Award of contracts," "Approval of Professional Service Contracts for Engineering and Planning," and approvals of certain leases, equipment procurement, preliminary project plans, and emergency contracts. Exhibit 1 further provides that the "Capital Committee shall be responsible for" various "activities," including the review of actions taken by the Executive Secretary and the making of various recommendations.

On September 25, 2008, the Authority adopted Resolution 08-11 to cure the Authority's defective adoption of amendments to the Operating Policy by "amendment," rather than by resolution. Resolution 08-11 (the "corrective resolution") lists ten such amendments adopted from 1985 through March 2007, including Exhibit 1. Stating that it "desire[d] to document compliance with the Amendments provision of the Operating Policy," the Board resolved to retroactively ratify the "December, 9, 1985 through December 21, 2006 amendments," but not the 2007 amendments. As to the 2007 amendments, the sixteenth "whereas" clause of the corrective resolution provides:

> [T]he Authority has determined it will separately consider the amendments that were approved and adopted by motion on February 15, 2007 and March 14, 2007 to determine what action, if any, it needs to take with respect to those amendments....

The Authority interprets the exclusion of Exhibit 1 from the corrective resolution and the Authority's subsequent inaction regarding that amendment as evidence that it had not created the Capital Committee as a formal body. Viewed in a vacuum, those facts would support that inference. However, the corrective resolution did not wipe the slate clean; neither it nor its Attachment 1, a new Operating Policy,[1] purported to invalidate properly-adopted resolutions. We cannot ignore them. Over a year earlier, on June 28, 2007, the Authority had adopted Resolution 07-06, a "Resolution Authorizing the Capital Committee to Approve Certain Contracts and Contract Modifications and to Take Certain Actions."

Resolution 07-06 recites the Authority's prior delegation of "certain procurement and contracting authority" to its Executive Secretary and then states:

> [T]he Authority intends to delegate its authority to the Capital Committee to approve, over and above the levels delegated to the Executive Secretary [by an earlier resolution] ... certain planning, engineering, right-of-way, and construction contracts and contract modifications ... and to authorize the Capital Committee to take certain actions related to the Authority's transportation facilities projects....

Resolution 07-06 further states the Authority's authorization to the Capital Committee "to approve, on behalf of the Authority, any and all of the following specific action items...." The action items included certain construction and service contracts "in the amount of $200,000 or less," and certain revenue-generating contracts between $50,000 and $5,000,000. The resolution further authorized the Capital Committee to "approve and award" certain contract modifications and budgeted contracts and to approve nine activities. Although the resolution does not refer to Exhibit 1, the authority granted in the resolution overlaps with the actions items listed on Exhibit 1 as the action items for which the Authority would "by resolution delegate

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[1] The Resolution also stated the Authority's approval of that "draft Operating Policy." As stated by the Authority, that Policy does not create any committees.

approval authority" to the Capital Committee. In other words, the Authority acknowledged and implemented its March 14, 2007 "amendment" (Exhibit 1) by adopting Resolution 07-06 that June.

The sole question here is whether the Capital Committee was "created by ... a rule, resolution, or bylaw...." under the "legal instrument" test in SG § 10-502(h)(1)(ii).[2] We have interpreted *Andy's Ice Cream*, *supra*, 125 Md. App. 125, to "strongly [suggest]" that the test not be construed narrowly. 6 *OMCB Opinions*, *supra,* at 27. There, we addressed the question of whether the test was met by a school boundary committee appointed by an area assistant school superintendent under a Board of Education policy. The Board policy "provide[d] little detail prescribing the committee's governance," did not specify the number of members needed for a quorum, and left the composition of the committee to the area assistant school superintendent. Nonetheless, the policy "mandated [his] action" in creating the committee. We therefore concluded that the committee was "created by" the policy within the meaning of SG § 10-502(h)(1)(ii).

The chronology here is different and more complex than that in 6 *OMCB Opinions* 21. Here, the Authority intended to adopt Exhibit 1 in 2007 as an "amendment" to its Operating Policy, then adopted a resolution premised on the existence of that Committee, and then, without modifying the resolution, declared the amendment of dubious validity on the grounds that it was not in the form of a resolution, apparently all while the Committee performed functions. However, there are significant similarities: while Resolution 07-06 does not spell out the composition of the Capital Committee, it mandates the performance of certain functions by that Committee and thus mandates the Committee's existence. Furthermore, the Capital Committee entity was created formally, albeit defectively, and, more to the point, was made effective formally. We therefore conclude that the Capital Committee was a public body subject to the Act and that it violated the Act whenever it conducted its meetings without notice or otherwise not in compliance with the Act's procedures.

We do not take issue with the Authority's argument that it may validly delegate its powers to committees, just as it may delegate them to its Executive Director. Those governance issues lie beyond our purview, as does the Executive Director, who, as one individual, lies beyond the Act's definition of

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[2] As a subcommittee of the Authority, the Capital Committee would be excluded from the SG § 10-502(h)(2)(i) definition, *see* SG § 10-502(h)(3)(ix), unless it also met the "legal instrument" test. It does not meet the requirement of SG § 10-502(h)(2)(ii) that at least two members not be members of the appointing entity.

a public body as a body consisting of "at least 2 individuals." SG § 10-502(h)(1). We simply conclude that the Capital Committee has been a public body since the Authority's formal recognition of the Committee by resolution.

E. The allegations regarding the Human Resources Committee.

While the documents evidence the creation of a Human Resources Committee, we have no information on how it was created and whether the Authority has adopted a resolution analogous to that adopted for the Capital committee. We also lack information on the creation of the Authority's other committees and groups. In case any of these committees fall within the definition of a public body under the Act, we counsel that the Act's procedures apply even when a committee has been created to handle matters for which meetings may properly be closed.

II

Conclusion

We conclude that the Act did not apply to the alleged actions of the Authority and the Finance Committee, but that the Act did apply to, and was violated by, the Capital Committee. We shall trust that the Authority's 2010 resolution that at least two of its committees will operate in the open will assure public access to its entire deliberative process.

OPEN MEETINGS COMPLIANCE BOARD

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